

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

To be argued by
Jill A. Jacobson

Docket No.

77-1131

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

ROBERT MARCHAND

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

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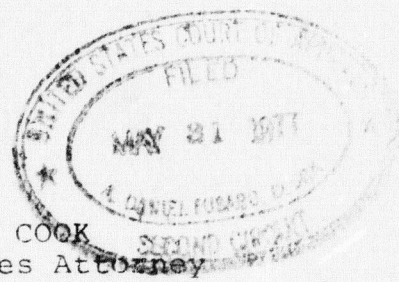


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IN THE
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v.

ROBERT MARCHAND

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Robert Marchand appeals from a judgment of conviction entered on February 18, 1977, in the United States District Court for the District of Vermont, after a three day trial before the Honorable James S. Holden, and a jury.

Criminal indictment 76-51, filed July 22, 1976, charged Marchand in two counts with violations of the narcotics laws. Count I, the conspiracy count, was dismissed by the Government before arraignment on

September 17, 1976. Count II charged Marchand with distributing and possessing with intent to distribute 180 pounds of marijuana in violation of Title 21, United States Code, § 841 and Title 18, United States Code, § 2.

The trial began on January 5, 1977, and terminated on January 12, 1977, with a verdict of guilty. On February 18, 1977, Judge Holden sentenced Marchand to imprisonment for a term of one year, to be followed by a special parole term of two years, and a fine of \$2,000.00. Execution of the sentence has been stayed pending the outcome of this appeal.

STATEMENT OF ISSUES

- I. WHETHER THERE WAS SUFFICIENT EVIDENCE FOR
SUBMISSION OF THE CASE TO THE JURY
- II. WHETHER THE EVIDENCE IDENTIFYING MARCHAND
AS BIGFOOT WAS PROPERLY ADMITTED
- III. WHETHER THE INDICTMENT WAS SUBJECT TO DISMISSAL
DUE TO PRESENTATION OF HEARSAY EVIDENCE TO THE
GRAND JURY

STATEMENT OF FACTS

I. The Government's Case

The Government proved, through the testimony of Drug Enforcement Administration agents and accomplice witnesses Richard Perkins and Victor Roy, that the defendant Marchand distributed and possessed with intent to distribute 180 pounds of marijuana on July 18, 1975, in Brattleboro, Vermont.

In the spring of 1975, Richard Perkins and Victor Roy discussed buying and selling marijuana. Roy informed Perkins that he knew of someone who might be able to help them get supplies. The person referred to was a former college acquaintance of Roy's known as "Bob" or "Big-foot" whom he had met recently after being out of touch for several years (A. 353, 356, 361).*

Roy placed a call to the number Bob had given him (A. 354, 364) and arranged a brief meeting at which the three men - Roy, Perkins and Bob - became acquainted (A. 328, 364). Subsequent to this first meeting, Perkins and Roy agreed to purchase varying quantities of marijuana from Bob (A. 328, 364-65). Each time, the participants followed the same pattern: Roy and Perkins would receive a call that marijuana was available,

* "A" refers to Appendix; "GX" to Government's Exhibit "D.Br." to Defendant's Brief.

and/or they would call Bob to arrange a pickup; Roy and Perkins would drive to a Howard Johnson's to meet their supplier, and Roy alone or Roy and Perkins would drive off with Bob to get the marijuana (A. 309-13, 328-29, 354-55, 358-59, 365-66). After the initial meeting in May, 1975 (A. 327), there were two occasions - within several weeks of each other - when Perkins and Roy purchased relatively small quantities of marijuana from Bob (A. 328-29, 364, 365-66). The third and last purchase was made on July 18, 1975; Roy and Perkins were arrested that night when they attempted to distribute the marijuana in Burlington, Vermont (A. 318, 360).

As with the earlier deals, the July 18th transaction was arranged by a series of telephone calls (A. 354). The parties agreed to meet at the Howard Johnson restaurant in Brattleboro, Vermont (A. 310, 354). Roy and Perkins drove there together, leaving their house in the late morning (A. 310-11, 354). Roy placed several calls to Bob Marchand's phone (A. 311, 355; GX 8, 9), while they waited several hours for their supplier to arrive.

When Bob appeared, Roy asked if he had the marijuana; he indicated that he did, and that Roy and Perkins should follow him to a rest area down the road so that it could be transferred to their car (A. 312, 358). Some discussion took place at that point about how and when payment

was to be made, and then 180 pounds of marijuana was quickly moved from Bob's car to the trunk of Perkin's car (A. 313, 359-60). Roy and Perkins were to sell the marijuana at a price of \$300.00 a pound; they were told to return that evening with either the money or the grass (A. 317, 359).

Roy and Perkins returned to their house in Waitsfield, Vermont and contacted a prospective purchaser in Burlington (A. 318, 360). A \$61,000.00 sale was set up, to take place that night at the Holiday Inn in Burlington (A. 318, 360). While the transaction was taking place, Roy and Perkins were arrested by undercover agents of the Drug Enforcement Administration, who had been posing as the buyers (A. 318, 360).

Victor Roy had been a friend of Robert Marchand's since 1971 (A. 368). When Roy testified before the Vermont grand jury in July 1976, he indicated that his friend Marchand was the Bob, or Bigfoot, who had supplied him with 180 pounds of marijuana (A. 368-69).

Within two weeks of the arrest, Perkins was interviewed by Special Agent Theodore Handoga, of the Drug Enforcement Administration (A. 318, 397). At that time, he furnished Handoga with a description of Bob, his supplier (A. 318, 397). The person described was a male, slightly over six feet tall, weighing 220 pounds, having blond hair, big features, big nose, big hands, and broad shoulders; Perkins placed his age between 25 and 30 years (A. 319). Two weeks to a month later, Perkins again met with Agent Handoga (A. 319, 398). At this meeting Perkins furnished a further description in the form of a drawing he had made of his supplier's face (A. 319, 397; GX 7)*.

Then, in April 1976, Perkins and Handoga met a third time, in the Federal Building in Rutland, Vermont (A. 324, 390). During this meeting Agent Handoga showed Perkins

* Perkins expressed some personal dissatisfaction with the drawing, but explained this in part by pointing out that he had had no model sitting in front of him. He indicated that he had drawn quite a few similar sketches of other people, and that drawing accurate pictures was easy when done from a live model. Perkins had no model for this particular picture; he therefore drew a picture of the man he had seen a month or so earlier as he remembered the man's features, to the best of his ability. (A. 321, 345)

a series of photographs, and was asked to select pictures of the two men who had supplied him with marijuana on July 18, 1975 (A. 320, 389-90, 398). Perkins chose two pictures, and dated and initialed the photographs (A. 326, 391). One of these photographs was a picture of the defendant, Robert Marchand (A. 391; GX 19).

At the trial, both Roy and Perkins failed to make a positive identification of the defendant Marchand as the supplier (A. 322, 367).

II. The Defense Case

One witness testified for the defense. Timothy Hillman, Massachusetts District Attorney and a civil lawyer for the defendant, related two conversations in which he had been a participant.

Shortly after July 4, 1976, Hillman went to see Victor Roy in Vermont (A. 418). Apparently, Hillman had learned that Roy had testified before a grand jury there, and that Marchand's photograph had been shown to the grand

jury in connection with Roy's testimony (A. 418-19). Hillman's conversation with Roy left him with the impression that Roy wanted to warn Marchand that he had identified him to the federal authorities (A. 425). Roy discussed several things with Hillman including the fact that he was involved with Bob Marchand in a marijuana transaction (A. 419); that prior to testifying before the grand jury he had a lengthy conversation with federal authorities (A. 419-20); that he had identified pictures of Bob (Marchand) and his girlfriend Ann (A. 420).

Hillman later discussed this conversation with Bob Marchand; Marchand took notes of the pertinent facts (A. 418; GX 11-A), including Victor Roy's address (A. 418; GX 11-A). Hillman told Bob to "get himself a darned good criminal lawyer and to get investigators sent up right away, because I believed he was in trouble " (A. 422). Marchand kept the notes of this conversation in his wallet, where they were found on the day of his arrest (A. 382).

III. Marchand's Pre-trial Motions

Defendant Marchand submitted a multitude of pre-trial motions. The most important of these were aimed at (1) suppressing all identification testimony - whether pre-trial or in court - given by witnesses Roy or Perkins;

(2) suppressing certain items seized from Marchand when he was arrested; and (3) dismissing the indictment.

Following an evidentiary hearing on October 12, 1976 and subsequent filing of legal memoranda, the trial judge ruled on defendant's motions as follows:

(1) The photographic identification of the defendant by Perkins was not the result of unnecessarily suggestive confrontation, the motion to suppress this identification, and Perkin's in court identification testimony was denied;

(2) Roy's photographic identification was infected by suggestion, and was suppressed without prejudice to a further offer by the Government establishing an adequate basis in support of an in court identification. After a hearing on January 5-6, 1977, the Court ruled that such a basis did exist, and Roy would be allowed to make an in-court identification;

(3) The motion to suppress evidence was denied, on the grounds that the police officers involved in the arrest acted within the framework of the "intermediate response" suggested by the Supreme Court in Adams v. Williams, 407 U.S. 143 (1972);

(4) The motions to dismiss were denied.

ARGUMENT

I.

THERE WAS SUFFICIENT EVIDENCE FOR SUBMISSION OF THE CASE TO THE JURY.

Marchand was convicted by a jury of charges relating to distribution of, and possession with intent to distribute, marijuana. Marchand here contends that the evidence presented at trial could not support a finding of guilt beyond a reasonable doubt, and, therefore, that the case should not have been submitted to the jury for a verdict. Careful review of the evidence shows that defendant's contention cannot stand.

It is clear that the trial judge acted in accordance with the standards enunciated by the Second Circuit in submitting the case to the jury. In United States v. Taylor, 464 F.2d 249 (2d Cir. 1972), this Court adopted the standard for determination of motions for judgment

of acquittal set forth in Curley v. United States,
160 F.2d 229, 232-33 (D.C. Cir.), cert. denied, 331
U.S. 837 (1947):

The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

Taylor, at 243.

The Court in Taylor clearly focused on the fact-finding function of the jury:

. . . But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.

Id., at 243. See United States v. Bohle, 475 F.2d 872, 875 (2d Cir. 1973). The Curley test must be applied to the totality of the Government's case and not to each element separately, since facts may gain color from each other. United States v. Taylor, supra, at 244.

The standard remains unchanged when the judge scrutinizes the evidence after a verdict of guilty and discharge of the jury to determine whether the accused is legally entitled to an acquittal. United States v. Sutton, 426 F.2d 1202, 1210 (D.C. Cir. 1969).

The jury is to consider all the evidence introduced, direct as well as circumstantial, United States v. Bowles, 428 F.2d 592, 597 (2d Cir. 1970), cert. denied, 400 U.S. 928 (1970), and all reasonable inferences therefrom. Taylor, supra, at 244-5. The same standard as this Court stated in Taylor, supra, applies where circumstantial evidence of guilt is presented:

We in no way subscribe to the doctrine that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt," which continues to be frequently urged by defense lawyers despite the Supreme Court's repudiation of it in Holland v. United States, 348 U.S. 121, 139-40, 75 S. Ct. 127, 137, 99 L.Ed. 150 (1954).

As this Court stated in Bowles, supra:

Circumstantial evidence is of no less probative value than testimonial evidence . . . The question is always whether the jury may rationally and logically infer the ultimate fact to be proved from basic facts, whether established by circumstantial or testimonial evidence and the surrounding circumstances of the case.

428 F.2d at 597.

The evidence, viewed in the light most favorable to the Government, as must be the case, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974), was clearly "sufficient . . . from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty." United States v. Glasser, 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971), quoting American Tobacco Company v. United States, 328 U.S. 781, 787 (1946).

Victor Roy testified at trial under a grant of immunity pursuant to 18 U.S.C. § 6002 et seq. He recited the facts concerning the July 18, 1975 transaction (A 353-361), as well as two earlier deals that took place in Springfield, Vermont (A. 364-65). Roy stated that he met Bob sometime in 1971 (A. 361), and later noted that he met Robert Marchand the same year (A. 368). He described Marchand as a friend. When asked to identify his supplier in Court, Roy claimed he "[didn't] see him here" (A. 367).

At that point, the Government proceeded to question Roy about prior testimony he had given before a grand jury on July 1, 1976. Roy admitted testifying before the grand jury, and indicating to that body that Robert Marchand was Bigfoot (A. 368, 369, 372). He asserted at

trial that he was not being "completely truthful" with the grand jury (A. 364) and that he was "misleading" them as far as this identification was concerned (A. 368). Roy claimed that in his failure to identify Marchand at trial, he was telling the truth for the first time (A. 371-72).

While Roy was on the stand, additional questions were raised about his grand jury testimony. At trial, Roy could not recall if Bob/Bigfoot had a companion the night Roy met him in a bar (A. 362). He admitted testifying before the grand jury that Bigfoot had been with Ann (A. 363). He claimed again that he was "misleading the grand jury to believe certain things" (A. 363-64). Then Roy confirmed that he had seen Ann with the defendant, and that they were living together (A. 373). The following testimony was then given:

Q: Do you recall that you testified in the grand jury that you saw Bob or Big Foot your supplier, with Ann?

A: That is the way the grand jury testimony reads.

Q: And is that the same Ann you know as a friend or companion of Mr. Marchand?

A: The Ann that I was referring to in there was.

Q: It was the same one?

A: (Nodding)

Later, on cross-examination, Roy reiterated that he . had been lying to the grand jury (A. 375-76); he then stated that there "might have been a girl with [Big Foot]", but if there was, Roy "didn't know what her name was" (A. 375). He added that he had never seen this girl, whose name he didn't know, with Marchand (A. 376). He admitted knowing Ann as Marchand's fiance (A. 376).

In addition, Roy testified about setting up deals with Bigfoot via the telephone (A. 365-66), but claimed inability to recall the number (A. 355) or have his recollection refreshed (A. 356). He further testified to making several calls from Brattleboro on the 18th of July, while waiting for Bigfoot (A. 355), but again claimed inability to recall the person he was trying to reach (Id.). On cross-examination, he claimed to have called Marchand several times, in an attempt to sell him marijuana and not to buy (A. 377).

Richard Perkins, an accomplice witness, testified about the July 18, 1975 marijuana transaction, and about two earlier transactions with the same supplier. His testimony shows that he had three or four opportunities to observe the man he knew as "Bog" or "Bigfoot" (A. 312, 327-29). On one of these occasions, Perkins

with the supplier for 5-15 minutes (A. 328); on another he saw him in a car "driving in and driving out" of a parking lot, but was not close enough to talk to him (A. 329). On July 18, 1975, Perkins testified, the marijuana was put in the trunk of his car "as fast as we could" and he was "very nervous" (A. 313).

When Perkins testified at trial, he had not seen Bob/Bigfoot for one and one-half years (A. 327, 338). After stating that his memory of that day was "very vague" (A. 321), he was unable to positively identify Marchand in court as his supplier. He did select Marchand as one person who resembled his supplier (A. 322), noting especially the color and style of his hair (A. 323). He also pointed out that his supplier did not have a beard in July, 1975, and, naturally enough, that he had been tanned and dressed in casual clothes (A. 323).

In addition to this testimony, the Government offered several pre-trial statements made by Perkins concerning the identity of his supplier. He testified, without objection by the defense, about a description he furnished to Drug Enforcement Administration Agent Handoga within two weeks of the last time he saw Bob/Bigfoot (A. 318-19, 339). The description was of a "six foot one, 220 pound man with

blond hair. . .big features, the guy is big, has a big nose, big hands, broad shoulders. . .between 25 and 30 [years old]" (A. 319). No mention was made of a beard or glasses.

Perkins further testified that about a month after this first description was given to Agent Handoga he drew a picture of Bigfoot (A. 319). The sketch, received in evidence over defense objection, added to the initial verbal description; the characterization of "big features" was given greater clarity, as was the style and length of Bigfoot's hair (GX 7). Perkins testified that he had drawn many sketches of other people (A. 345), and that it was easy for him to draw accurate representations of other people when "they are sitting in front of me," but that he had no live model for this picture (A. 345). Consequently, he spent a long time over the picture attempting to capture the big, blond-haired guy. . .[with] big features" (A. 334). He expressed some personal dissatisfaction with the sketch (A. 343), but stated clearly that it was Bigfoot (A. 319) as Perkins remembered seeing him (A. 321), and that he was trying to draw the picture to the best of his ability and recollection (A. 340, 345). The sketch, labelled Bigfoot, is of a clean-shaven face; and the individual shown is not wearing glasses (GX 7).

In addition, Perkins testified about a pre-trial photographic identification he made of the defendant in April 1976 (A. 324, 326). He was shown a series of pictures, and was asked to select the two people who had supplied the marijuana on July 18, 1975 (A. 324, 389, 398). Perkins dated and initialed the two photographs selected as the men most closely resembling his supplier; one of these was a picture of the defendant Marchand (A. 391; GX 19).

Perkins testified that he had been introduced to the supplier by Victor Roy (A. 328); and that he knew of a phone number, obtained by Roy, that would reach Bob/Bigfoot (A. 329, 330). Although he was not certain he had ever called the number himself, Perkins said he did know the number in July 1975 (A. 329). He identified one number from an old telephone billing statement as that used to reach Bigfoot (A. 330, GX 8). The number selected by Perkins was subsequently shown to be listed to Ann Curtis, who lived in Marchand's house (A. 350-51; GX 9). Perkins stated he did not know the name Marchand in July 1975 (A. 342, 344).

The testimony of these witnesses was supplemented by several exhibits which tended to show circumstantially that the defendant was, in fact, Bigfoot. Pursuant to a

stipulation signed by all parties, certain telephone toll records were received in evidence. These records reflect the names and addresses under which particular numbers were listed in July of 1975, and calls made from those phone numbers. From these toll records it is clear that calls were made from a telephone listed to Richard Perkins to a telephone listed to Ann Curtis on several occasions.* There are two calls early in June, about a week apart, that correspond with the two earlier marijuana deals involving Perkins, Roy, and "Bigfoot" (GX 8). There is one call on July 17th, and three calls on July 18th. Two of these July 18th calls were made from Brattleboro, where the three accomplices met, and charged to Perkins' home phone (GX 8). Perkins selected Ann Curtis' number as the one used to reach Bigfoot (A. 330), which he heard about from Victor Roy (Id.). Roy claimed he called his friend Marchand, the defendant, from Brattleboro, several times on July 18th to sell him some marijuana (A. 377). Roy repeatedly called his friend, Marchand, who had a number listed under his own name, at a number listed to Ann Curtis. There are no more calls to Victor Roy's friend after the marijuana deals stopped on July 18th (GX 8).

* The records further reflect that Ann Curtis' phone was located in the same house as another phone listed to the Marchand (GX 9).

Another exhibit received in evidence (GX 11A) further substantiates the testimonial evidence discussed earlier. This piece of paper was found in Marchand's wallet when he was arrested (A. 381-82). It contains notations made by Marchand about a conversation between Victor Roy and another of Marchand's lawyers, Timothy Hillman (A. 418). Hillman testified that he spoke with Roy just after July 4th, 1976 (A. 424), several days after Roy had appeared before the grand jury. Roy talked with him about being interviewed by Agent Handoga just before his grand jury appearance (A. 424-25), and apparently told Hillman that he had identified Marchand to federal authorities as his marijuana supplier (Id.). Hillman stated that Roy spoke to him reluctantly about what he had done to his "friend" (Tr. 291). Hillman was convinced that Roy had identified Marchand, and as a result he warned Marchand to "get a darned good criminal lawyer. . .because I believed that he was in trouble" (A. 422). He further stated that it was "a fair assumption" Roy wanted him to warn Marchand that Roy had talked to federal authorities about the crime with which he had accused Marchand (A. 425). Marchand kept this warning in his pocket until the day he was arrested (A. 382).

A review of the evidence clearly shows that the trial judge acted properly in submitting the case to the jury. Although the two eyewitnesses to the crime failed to make an in-court identification of Marchand, other testimony was introduced to show that both had identified Marchand as "Bigfoot" prior to trial. Perkins' early verbal description, supplemented by the picture he drew, was before the jury, as was the photographic identification made months before trial.* In addition, Perkins identified a telephone number listed to Marchand's girlfriend as the one used to call "Bigfoot".

Roy's testimony at trial was impeached by references to his prior sworn testimony before the grand jury, and the jury was properly charged that if they believed that prior testimony it could be considered as substantive evidence against Marchand. The trial jury heard Roy say repeatedly that he had "misled" the grand jury, and

* As was stated before, the description was not objected to, and the photographic identification was admissible under F.R.Ev. 801(d)(1)(C). There is no limitation in the Rule as to when or how the prior identification is made. Therefore, once the Court determines, in the case of photo identifications, that the identification is reliable, i.e., that the witness has an adequate basis on which to make an identification, there is no reason to distinguish between prior photographic and corporeal identifications.

that he had not been "completely truthful" before that body. They heard him talk about Marchand as his friend. They heard from Marchand's lawyer that Roy admitted to him that he had identified his friend to federal authorities as his supplier. Taken in conjunction with this testimony, the telephone toll records and the note provided a vital link connecting the defendant to the July 18th distribution.

Cases concerned with sufficiency of identification evidence indicate that when eyewitness identification is less than positive, something more in the form of connecting or corroborating facts or circumstances is necessary to allow submission to a jury. United States v. Johnson, 427 F.2d 957, 961 (5th Cir. 1970). These cases also consistently stress that the trial judge must consider the "totality of the circumstances" when making his decision on submission, especially when the question of identification is crucial. United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972); United States v. Levi, 405 F.2d 380 (4th Cir. 1968). See United States v. Taylor, supra.

Defendant relies on United States v. Keller, 512 F.2d 182 (3d Cir. 1975), and United States v. Johnson, 427 F.2d 957 (5th Cir. 1970) to support his claim of insufficient evidence (D.Br. 32). In Keller, the single eyewitness failed to make an in-court identification and a pre-trial photographic identification was introduced. The conviction was reversed, the court stating that the pre-trial identification by this witness was insufficient because it was tentative in nature, and was the result of a blatantly suggestive procedure. Moreover, there was no other evidence presented which "tend[ed] to place" the defendant in the proper time and place for the crime. United States v. Keller, supra at 184-85.

In the Johnson case the Government presented two eyewitnesses, one of whom could not make a positive identification of the defendant, and one who recanted earlier statements that would have identified the defendant. The attempt to repair the damage caused by the second witness was held improper on appeal, since the Government sought to impeach the witness' failure through the testimony of an agent to whom the witness identified the defendant. The Court of Appeals held that this hearsay testimony could not be used as substantive evidence against the defendant; and therefore, because the sole remaining witness was unsure,

and no other connecting or corroborating facts or circumstances had been proven, the jury was necessarily forced to make a decision based upon uncertainty. Such a conviction had to be reversed. United States v. Johnson, supra at 961.

In this case, the Government presented two eyewitnesses, both of whom failed to make a positive in-court identification. They did state that Marchand resembled their supplier. The Government contends that these failures presented only questions of weight, in light of other evidence tending to connect defendant with the crime, and therefore, that the testimony of these witnesses was not devoid of probative value. See Smith v. United States, 358 F.2d 695 (5th Cir.) cert. denied, 384 U.S. 971 (1966). There is no rule of law that requires an identification to be positive beyond any shadow of doubt. The sufficiency of identification is generally for the trier of fact. Testimony by a witness that although he is not absolutely sure, a defendant "resembles" or "looks like" the person the witness observed and in regard to whom he has testified, may be sufficient when considered with other evidence. United States v. Terrell, 390 F. Supp. 371, 375 (S.D.N.Y. 1975); United States v. Kelley, 334 F. Supp. 435, 436 (S.D.N.Y. 1971), aff'd without opinion, 471 F.2d 647 (2d Cir. 1973). In addition to the witnesses' in-court testimony that Marchand resembled their supplier,

there was other more weighty evidence available for the jury's consideration that necessarily contributed to their finding of guilt. Perkins' photographic identification, even if not found to be a positive one, demonstrated to the jury that he had selected a particular photograph when looking for a picture of his supplier. The photo together with the earlier sketch and description presented a clear picture of Perkins' memory of Bigfoot. Perkins identified Bigfoot's phone number, which was the same as the number of Robert Marchand's girlfriend. Perkins testified he did not know Marchand's name in July 1975 (Tr. 209), so he would have no other reason to identify that particular number. The number identified by Perkins was called, by Victor Roy, three times on the day in question.

In addition to Perkins testimony and the telephone records, Victor Roy's testimony was available for consideration. Roy placed himself in a position similar to that of the second witness in the Johnson case, supra. There is one crucial difference, however, between the Johnson case and this one: Roy was not impeached by the hearsay testimony of a third party. He was impeached by his own testimony to a grand jury and his statements before the trial jury describing his intent to mislead the grand jury. This testimony was admissible substantively against the defendant under F.R.E. 801(d)(1)(A). United States v. Blitz, 533 F.2d 1329, 1345 (2d Cir. 1976); United States v.

Jordano, 521 F.2d 695 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519 (2d Cir. 1975); United States v. DeSisto, 329 F.2d 929 (2d Cir.), cert. denied, 377 U.S. 979 (1964).

Rule 801(d)(1)(A) allows prior inconsistent statements to be used substantively if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, provided the statement was "given under oath and subject to the penalty of perjury" at another proceeding. Theoretically, it would be possible to make out a prima facie case with only such a prior inconsistent statement as evidence. Weinstein, Evidence, 801-74. Under Rule 801(d)(1)(A) prior inconsistent statements are admissible substantively because "the dangers against which the hearsay rule is designed to protect are non-existent. The declarant is in court and may be examined and cross-examined. . .[and] in many cases the inconsistent statement is more likely to be true. . .because it was made nearer in time to the matter which it relates. . ." Notes of Advisory Committee on Proposed Rules.

Defendant's main complaint on this point is that no verbatim statements made by Roy to the grand jury concerning Marchand's identification were introduced at trial. But nowhere in Rule 801(d)(1)(A) does it state that inconsistent statements may be used if presented in their transcribed or verbatim form. In fact, such a requirement would contradict one of the traditional methods of proving former testimony: that any firsthand observer of the giving of the former testimony may testify to its purport from his unaided memory; exact words are unnecessary. McCormick, Evidence, 2d Ed., § 260 at 624. See Ruch v. Rock Island, 97 U.S. 693 (1878).

A more recent Ninth Circuit case dealt with an issue similar to that raised by defendant concerning use of inconsistent statements under Rule 801(d)(1)(A). In United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir.

1976), witnesses made statements at trial that were inconsistent with statements made to a Border Patrol Agent following their arrest. The agent then testified to the substance of the prior statements which were inconsistent with the witnesses' in-court testimony. The trial court instructed the jury to consider these prior statements as evidence of the defendant's guilt. Id. at 1955 (emphasis added). On appeal, the Ninth Circuit affirmed the admission of the evidence, and the instruction to consider the "statements" as substantive evidence. Id. at 1058.

Roy's testimony meets the criteria set out in Rule 801(d)(1)(A); the fact that he testified to the substance of his prior statements in no way detracts from their value as affirmative evidence.*

* Furthermore, defendant's assertion that use of these statements violated the judge's ruling on use of the photographic identification is frivolous. The judge clearly found that Roy had an adequate basis for being able to identify his supplier. The ruling that suppressed use of his photographic identification at trial rested upon a finding that the procedure had been defective, not that Roy could not make a fair identification. In any case, photographs were never mentioned in the course of Roy's testimony.

II. THE EVIDENCE IDENTIFYING MARCHAND AS BIGFOOT
WAS PROPERLY ADMITTED.

Marchand argues that the judge erred in admitting evidence he claims was unreliable and tainted by constitutional error. A review of the evidence clearly shows that the matters complained of were properly before the jury. Thus, the conviction of Marchand should not be overturned.*

* Marchand also argues in passing that the Government should have submitted a sworn written response to his claim of electronic surveillance (D.Br.49 a, fn. 46a). This argument must fail, as defendant's moving papers were clearly insufficient to trigger the Government's obligation to respond by affidavit or sworn testimony. In re Millow, 529 F.2d 770 (2d Cir. 1976), held that the Government's response is directly related to and depends upon the specificity of the charges by the claiming party. An all-agency search is not always required. In re Buscaglia, 518 F.2d 77 (2d Cir. 1975); United States v. Grusse, 515 F.2d 157 (2d Cir. 1975). Defendant's claim was submitted in an affidavit of counsel that contained no statements of personal knowledge and no references to sources of information. Thus, the threshold criteria set forth in Millow for requiring a sworn response are not met.

A. PERKINS' PHOTOGRAPHIC IDENTIFICATION WAS NOT IMPERMISSIBLY SUGGESTIVE AND WAS ADMISSIBLE, ALONG WITH THE SKETCH, AS A "STATEMENT OF IDENTIFICATION."

On April 26, 1976, Richard Perkins selected photographs of Bob Marchand and another man from a display of pictures shown to him by Agent Handoga. Marchand argues that the selection was the result of improperly suggestive procedures and that the photograph should have been suppressed. Upon consideration of the factors used to determine suggestiveness, it is clear that this argument has no merit.

This Circuit has held that there is no impropriety in using photographic identification even where the suspect is available for a line-up. United States ex rel. Pella v. Reid, 527 F.2d 380, 384 (2d Cir. 1975). Clearly where, as here, the suspect was not in custody or otherwise available for a line-up, use of photographic identification is not impermissibly suggestive per se.

It is also clear that the lapse of time between the date Perkins last saw the defendant and the date of the photographic identification is not in and of itself decisive. See United States v. Hurt, 476 F.2d 1164 (D.C. Cir. 1973) (lapse of approximately one year). In this case, Perkins saw the photographs some nine months after he last saw the defendant; in the interim Perkins had drawn a good likeness of him.

Further, Agent Handoga testified at the suppression hearing that he had no pictures of Marchand until late 1975, and possibly not until after February 1, 1976 (A. 99-100). Obviously he could not show them to Perkins before that time.

Defendant complains that the use of two photographs of him, including one of the larger photographs, emphasized him in an unnecessarily suggestive manner. But in United States v. Falange, 426 F.2d 930 (2d Cir.), cert. denied, 400 U.S. 906 (1970), where defendants complained of a display in which three of sixteen photographs were of the same defendant, the Court found no constitutional infirmity. The decision was based, in part, on the fact that the photographs were taken at different times and at different angles.

Similarly, the fact that the defendant was depicted in one of two larger photographs is without consequence. Characteristics peculiar to a photograph, rather than to the individual depicted, do not render use of that photograph unnecessarily suggestive. See United States v. Harrison, 460 F.2d 270, 271 (2d Cir.), cert. denied, 409 U.S. 862 (1972); United States v. Fernandez, 456 F.2d 638, 641 (2d Cir. 1972); United States v. Magnotti, 454 F.2d 1140, 1141 (2d Cir. 1972). Moreover, the differences in skin and hair coloration noted by the defendant in the display is rendered insignificant by the fact

that all but three of the photographs are on black and white film. Comparison of coloration with Perkins' drawing of Marchand is similarly unavailing; the sketch is a line drawing, with no indication of hair or skin coloring.

Defendant's argument that the photograph chosen by Perkins was not admissible fares no better. Even before the recent amendments to the Federal Rules of Evidence took effect, this Circuit admitted prior photographic identifications as affirmative evidence, at least where a witness could not presently make an identification. See, e.g., United States v. DeSisto, 329 F.2d 929, 932-34 (2d Cir.), cert. denied, 377 U.S. 979 (1964). Rule 801(d)(1)(C) makes such identifications admissible without reference to the hearsay rule.

In arguing against admissibility, defendant contends that Perkins' photographic identification was not a "statement of identification" within the rule because it was less than positive. There is no basis for such an argument in the rule itself; indeed, Rule 801 was designed so that details of just this type would come to the trial jury's attention. A statement of prior identification is admissible

only if the declarant testifies at trial and is subject to cross-examination concerning the statement. Thus, if a prior identification has been made cautiously or with uncertainty and hesitation, vigorous cross-examination should bring this out. The jury will then afford the earlier identification as much weight as it feels is merited.

This was precisely the case here. Perkins was cross-examined extensively about the identification he made, and any uncertainty he had was revealed to the jury. Perkins clearly had an adequate basis for making an identification; his hesitation to be positive presented only a matter of weight for the jury. Taken with other evidence tending to inculcate Marchand the jury could consider the identification, even as cautious as it was, as further evidence of guilt.

Defendant's reliance on United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975), is misplaced. In that case, the defendant wanted to have an FBI agent testify about a photographic display shown to another witness. The court ruled the testimony inadmissible due mainly to the hearsay nature of such third-party testimony. In addition, the court noted that the witness who had viewed the photographs could no longer recall at trial which pictures he had selected and that the agent had testified on voir dire that the witness

was equivocal even when making his identification. Due to such a high level of uncertainty and the hearsay problem, the identifications were excluded.

Here, on the other hand, Perkins himself testified about the pre-trial identification and there was no question about which picture he had chosen. In addition, and most importantly, hearsay was not a factor under Rule 801(d)(1)(C). Thus, the main barrier to the admission of such testimony raised by Jenkins was removed by the amendment to the Rules of Evidence.

Perkins' sketch of Marchand was admissible on similar grounds; it is clearly a "statement of identification" made after Perkins saw his supplier for the last time. Its value as evidence lay not so much in its accuracy,* as in the fact that it was completed close in time to the crime and that it shows Perkins had a clearer idea of Bigfoot's appearance than he thought at the trial. The sketch serves to "flesh out" the verbal description Perkins gave earlier, and again makes clear that the supplier had neither beard nor glasses in July 1975.

* The sketch is remarkably accurate, especially when compared with the photograph Perkins later selected of his supplier (See GX7, 19).

Moreover, admission of the sketch, as with the photograph, cannot be said to have violated either defendant's Sixth Amendment nor due process rights. Full opportunity to cross-examine Perkins was given, and - used; thus any unreliability inherent in such a sketch was exposed to the jury immediately. And even if the sketch were held not to be a "statement of identification," and admission thus violative of the hearsay rule, this would not be a due process violation per se. The sketch was virtually identical to the photograph Perkins selected several months later, and also was similar to the earlier verbal description. There was sufficient other evidence of Marchand's guilt so that the sketch would simply constitute another piece of evidence tending to connect Marchand to the crime. See California v. Green, 399 U.S. 149 (1970); United States v. Pacelli, 470 F.2d 67, 69-70 (2d Cir. 1972), cert. denied, 410 U.S. 983 (1973).

In light of the admissibility of the photograph and the sketch, the judge's instructions were clearly proper; especially since they emphasized that identification of the defendant was the crucial issue to be resolved.

B. THE COURT'S INSTRUCTION CONCERNING ROY'S
GRAND JURY TESTIMONY WAS PROPER.

Defendant claims that the instructions of the trial court concerning Victor Roy's grand jury testimony constituted reversible error. No challenge is raised as to the validity of this instruction under the law of the Circuit, or of the Federal Rules of Evidence; rather, the defendant's quarrel is with the judge's evaluation of the factual evidence supplying the basis for the charge. A review of the evidence at trial shows that the necessary factual basis existed for the judge's charge on this point; thus, failure to charge that Roy's grand jury testimony could be considered as substantive evidence would have been error.

United States v. Persico, 349 F.2d 6 (2d Cir. 1965).

Roy's testimony at trial reveals that several references were made to his prior grand jury testimony:

- 1) He was confronted with earlier statements that his supplier was with a girl named Ann, after he stated at trial that he couldn't recall whether Bigfoot was with a girl. Roy admitted making the statements, but indicated they were "not completely truthful" (A. 363-64);

2) Following Roy's in-court failure to identify the defendant Marchand as his supplier, he was asked again about his prior sworn testimony. He affirmed at the trial that he had led the grand jury to think he could identify Marchand as his supplier (A. 368).

After further questioning about the identification of his friend Marchand to the grand jury, Roy claimed he was "telling the truth now" because he was testifying under a grant of immunity and because he knew what he had made as a prior statement (A. 371-72). Still later, Roy affirmed that when he talked to the grand jury and indicated to them that Marchand was his supplier, he created some trouble for his friend (A. 372). He further testified that he had seen Ann with Bob Marchand, and that, in fact, they were probably living together (A. 373). Then he stated the Ann referred to in his grand jury testimony as being with Bob/Bigfoot was the same Ann that he knew as a friend or companion of Bob Marchand (A. 374). Other evidence was introduced at the trial to show that the full name of Marchand's companion was Ann Curtis (A. 350-51; GX 9A).

Clearly, the court's instructions had a firm factual foundation in the evidence. The jury heard statements con-

cerning Roy's grand jury testimony about Ann - whom the jury could have believed was Ann Curtis, although Roy himself did not use her surname. They heard Roy state several times that he had led the grand jury to believe that Bob Marchand, his friend, was Bob/Bigfoot. The fact that Roy's exact statements identifying Marchand were not introduced is not controlling, since neither Rule 801(d)(1) nor case law specifies that prior inconsistent statements may be introduced only in the form of a written transcript. (See Argument I, *supra*, pp.27-28) Indeed, Rule 613 clearly states that when a witness is questioned about a prior statement, it need not be shown nor its contents disclosed.

Since a clear factual basis did exist, the judge's instruction was proper. California v. Green, 399 U.S. 149 (1970); United States v. Blitz, 533 F.2d 1329 (2d Cir. 1976); United States v. Jordano, 521 F.2d 695 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519 (2d Cir.), cert. denied, 96 S. Ct. 367 (1975); accord, United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976).

Similarly, there is no basis for defendant's claim that the Government misstated the evidence in closing argument. Each of the statements referred to by defendant as misleading is supported by the evidence presented to the jury: Roy indicated he was under oath when testifying before the grand jury (A. 373); he admitted testifying to that body that

Marchand was his supplier (A. 368-69, 372); he told the petit jury that Marchand was his friend (A. 368-69). In addition, Timothy Hillman testified for the defense that Roy talked to the federal authorities about Bob Marchand and his fiancée, Ann. He stated that Roy identified pictures of these two individuals shown to him the day he appeared before the grand jury (A. 418, 420). Since all the statements found troublesome by the defendant were in evidence and on the record, it was not improper for the Government to use them in argument. United States v. Hart, 407 F.2d 1087, 1090-91 (2d Cir. 1969), cert. denied, 395 U.S. 916 (1969).

C. THE NOTE SEIZED FROM MARCHAND SHOULD NOT
HAVE BEEN SUPPRESSED.

Defendant contends that Gov. Ex. 11-A - a piece of paper containing notes of a conversation concerning Victor Roy and Marchand - was inadmissible at trial as the fruit of an illegal arrest (D.Br. 66). This contention is not supported by the facts.

Seizure of the note occurred inside the apartment of a known Florida drug dealer, Robert Higgins. Federal and local officers had entered the apartment to effect his arrest pursuant to a valid warrant obtained after extensive surveillance. Marchand was present in Higgins' apartment at the time of the arrest; in fact, since he was sleeping in one of the bedrooms it appeared that he was living in the apartment. Agent James Harris, of the Drug Enforcement Administration, as the officer in charge directed another officer to establish Marchand's identity and to make sure he was not armed. Shortly after these directions were given, Detective Adcock informed Agent Harris that she had reason to believe Marchand was a fugitive from Vermont. She had spoken with Agent Handoga of

the Vermont Drug Enforcement Administration office about Marchand, and Marchand's picture had been forwarded to her as well.

Agent Harris verified this information by a phone call to Handoga in Vermont. He then advised Marchand of his rights, informed him of the charges against him, and placed him under arrest. Marchand was then searched, and various papers were seized (A. 108-121).

Defendant's challenge to the arrest focuses on the validity of the procedures used to establish his identity. Apparently Detective Adcock obtained Marchand's name by removing his driver's license from his wallet. Under the circumstances this procedure was reasonable; as a result, defendant's arrest is not subject to challenge.

Clearly, Agent Harris was justified in directing that defendant be identified and, if necessary, disarmed. Law enforcement officers entering a dwelling place to execute an arrest warrant may take reasonable steps to ensure their safety while they are performing their duty. Adams v. Williams, 407 U.S. 143 (1972). The validity of a limited search for arms is beyond question. Terry v. Ohio, 392 U.S. 1 (1968). The problem of requesting and obtaining identification is one that has received less

attention, but under the teaching of Terry v. Ohio, supra, and Adams v. Williams, supra, this kind of intrusion is justifiable as long as it satisfies a test of reasonableness. United States v. Coates, 495 F.2d 160 (D.C. Cir. 1974).

In this case, the action taken by Detective Adcock — to determine defendant's identify fit within the type of "intermediate response" suggested by the Supreme Court in Adams:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

407 U.S. at 145-46.

The officers were properly within the apartment pursuant to Higgin's arrest. United States v. Rodriguez, 532 F.2d 834, 838 (2d Cir. 1976). Once they encountered the defendant in the apartment they were entitled to question him and to determine his identity. Id. at 838-839. No physical search of the defendant was

conducted, since, as he stated himself, his wallet was not on his person when the police entered the apartment.

Such a limited intrusion as inspecting defendant's driver's license was justified by the facts then known to the officers. Unlike the defendant in Sibron v. New York, 392 U.S. 40 (1968), Marchand was not merely talking with known addicts in a public place; he was living with a known drug dealer. Thus, the police were justified in any suspicions they might have had that Marchand was an accomplice in Higgin's activities;* they were further justified in fearing that Marchand might attempt to destroy the means to identify him and any evidence that might be in the wallet. Under these circumstances they were entitled to find out who he was by taking his wallet and detaining him for questioning. United States v. Rodriguez, supra. See United States v. Santana, 485 F.2d 365, 368 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974); United States v. Manarite, 448 F.2d 583 (2d Cir.), cert. denied, 404 U.S. 947 (1971).

* Shortly after entering the apartment, the officers found several guns(A. 134). Knowledge of this could only add to the potential danger of having an unknown person on the premises and heighten their suspicions of his activities.

Cf. United States v. Tramunti, 513 F.2d 1087, 1100-1104 (2d Cir.), cert. denied, 423 U.S. 832 (1975).

Since Marchand apparently refused to cooperate by giving his name, removal of his driver's license was a justifiable, limited intrusion to secure identification. Adams v. Williams, supra. Indicative of the restraint exercised by Detective Adcock is the fact that nothing other than his license was sought nor removed from his wallet at the time of initial contact. Her actions were thus reasonably related in scope to the circumstances which justified the interference. Terry v. Ohio, supra. See United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

Furthermore, it is not at all clear that Detective Adcock recognized Marchand only after she had his driver's license in her possession. She had previously received a picture of him with information about the outstanding Vermont indictment. Based on information received from federal agents, she would have been justified in making an arrest, and any search she might have conducted at that point was justifiable as incident to the arrest that followed later. See United States v. Lyles, 488 F.2d 290, 291-92 (5th Cir.), cert. denied, 419 U.S. 851 (1974). The fact that the usual procedure was reversed would not

render the search illegal, as long as probable cause
to arrest existed at the time of the search. United
States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974), cert.
denied, 420 U.S. 925 (1975); United States v. Riggs,
474 F.2d 699, 704 (2d Cir.), cert. denied, 414 U.S. 820
(1973).

III.

THE INDICTMENT WAS NOT SUBJECT TO DISMISSAL

Marchand contends that the Government violated the rule enunciated in United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972), by eliciting hearsay testimony before the grand jury. He further argues that the only non-hearsay evidence presented to the grand jury was Roy's photographic identification of Marchand; and since this evidence was later excluded at the trial, it was insufficient to support the indictment. These contentions are without merit.

Clearly, the use of hearsay testimony before a grand jury is not forbidden. In Costello v. United States, 350 U.S. 359 (1956), a case where all the testimony presented to the grand jury was hearsay, the Supreme Court noted that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." Petitioner's challenge to the indictment was rejected, the Court holding that:

An indictment returned by a legally constituted and unbiased grand jury. . . if valid on its face, is enough to call for trial of the charge on the merits.

Id. at 363.

Costello is still the law of the Second Circuit; and although this Court has issued warnings that hearsay testimony should not be used so as to deceive grand jurors into thinking they are hearing firsthand testimony, the presentation of hearsay evidence in grand jury proceedings remains acceptable. United States v. Harrington, 490 F.2d 487, 489 (2d Cir. 1973).

Relatively few indictments have been dismissed because they were based on hearsay evidence presented to a grand jury. Where this Court has granted a dismissal on these grounds, it has been based on a finding that the hearsay testimony was excessive, unnecessary, and so misleading as to nullify the purpose for which a grand jury sits. The leading example of this kind of misuse of hearsay evidence is United States v. Estepa, supra; that indictment was dismissed after the admonitions issued by this Court in earlier decisions were flagrantly disregarded. See, e.g., United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966), cert. granted, 386 U.S. 940, cert. dismissed as improvidently granted, 389 U.S. 80 (1967).

Estepa involved a four-count indictment charging certain individuals with distribution and possession of heroin. The only witness to testify before the grand jury was a policeman whose observation of and contact with the defendants was limited and remote. In spite of this, the witness testified at length and in detail to facts and conversations he neither saw nor heard in toto. The grand jurors were never made aware of the witness' lack of personal knowledge, except for one instance when he indicated he had not observed "the actual pass" of drugs.

In dismissing the indictment, this Court indicated that the reason for its action was that the grand jury had been "misled into thinking it [was] getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed. . . ." United States v. Estepa, supra, at 1136, quoting United States v. Leibowitz, 420 F.2d 39, 42 (2d Cir. 1969). At the same time, the Court specifically declined to adopt a rule requiring that only first-hand evidence be presented to grand juries absent a showing that requiring the primary witness' presence would impose an unreasonable burden on one of the parties or on a witness. Id., at 1136.

In subsequent cases, this Court has stressed that the Estepa ruling was intended as a warning that it is imper-

missible to have law enforcement officers who have no first-hand knowledge of the subject the grand jury is investigating testify as if they possessed that knowledge. United States v. Harrington, supra, at 489. Although the Court continues to remind the Government that hearsay testimony is less favored than first-hand evidence, use of hearsay alone does not mandate dismissal of an indictment. Id., at 490 n.1. See United States v. Burse, 531 F.2d 1151, 1155-56 (2d Cir. 1976).

The testimony presented to the indicting grand jury in this case is clearly not the type of hearsay which would require dismissal of the indictment.* See United States v. Harrington, supra; United States v. Olsen, 453 F.2d 612 (2d Cir. 1972), cert. denied sub nom. Leach v. United States, 406 U.S. 927 (1972). A portion of the evidence consisted of a transcript of Richard Perkins' testimony before a grand jury that was discharged before the investigation was complete; the transcript was read to the new grand jury in its entirety,

* Even if the hearsay evidence were held to be improper, the indictment could not be dismissed, since there was sufficient non-hearsay evidence to support it. See argument, infra, at 53.

except for certain warnings to the witness regarding the nature of the grand jury proceedings. Perkins had testified on September 18, 1975, about a July 18, 1975, purchase of marijuana from a supplier known to him as Bigfoot or Bob. He described the transaction, indicated that he had met this supplier through Victor Roy and learned his name was Bob Marchand, and stated that he thought he could recognize a picture of him (A.179-191).

Special Agent Theodore Handoga, of the Drug Enforcement Administration, read this transcript and then testified further. He related his own observations of Perkins and Roy as they attempted to distribute the marijuana obtained from Bob; he mentioned the results of the chemical analysis performed on the substance seized from Perkins and Roy; he described conversations he had with both Roy and Perkins wherein they provided him with details of the July 18 transaction and the identity of their supplier; and he informed the grand jury that his own investigation had revealed calls from Roy and Perkins telephone to a number in the area where the supplier lived, and that this number was located in Bob Marchand's house (A. 191-97).

Obviously, as in Harrington and Olsen, the nature of the hearsay involved was not of the kind held to require dismissal in Estepa. The grand jury was clearly not deceived into thinking that the transcript of Perkins' testimony was first-hand, and while they were not specifically informed that he could appear before them should they feel it necessary, they were given an opportunity to raise questions about the evidence that had been presented (A. 197). Further, Agent Handoga's direct testimony was largely based on his own first-hand observations: he was involved in surveillance of Roy and Perkins; he showed both witnesses photographs to obtain an identification of their supplier; and he conducted the investigation concerning the telephone numbers of Roy, Perkins, Marchand, and "Annie" (A.176-97). That portion of Handoga's testimony that was most purely hearsay - the recitation of conversations with Roy and Perkins about July 18, 1975 - could not really be said to have misled the grand jury; although Handoga had no first-hand knowledge of the events of that day, his testimony was repeated in substance by Perkins (via the transcript) and by Roy. Moreover, it was clear from the agent's testimony that he was relating conversations, and not attempting to characterize this portion of the evidence as his own first-hand observation.

In light of the character of Agent Handoga's testimony, and the additional fact that the indicting grand jury did have the live testimony of Victor Roy, the indictment is not subject to dismissal because it was founded upon excessive or misleading hearsay.

The facts of this case are readily distinguishable from several cited by defendant for the proposition that use of prior testimony in transcript form may require dismissal. In United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975), a superseding indictment based on transcript testimony was dismissed. A new grand jury had been convened to consider the superseding indictment; they were presented with transcripts from the original grand jury and were told that the testimony had resulted in an indictment. They were further informed that the first indictment was deficient only for technical reasons, thus necessitating a new one. In dismissing the superseding indictment, the Court noted several bases for its decision: the prosecutor should have advised the grand jury about the quality of the hearsay evidence presented, especially since the witness involved was an admitted perjurer and his demeanor was important; the prosecutor should have alerted the grand jury that the transcript was permeated with material perjury; the grand jury should have been supplied the complete record of the

prior proceeding; the changes sought were not merely "technical." Id., at 316.

In this case, such grave problems with transcript testimony were not present. There is no indication that Perkins testimony was anything but truthful, the grand jury heard all his testimony, and there was no discussion about how a prior grand jury had reacted to the evidence. Furthermore, live testimony was presented to this grand jury by a first-hand witness whose recitation of the facts was very similar to that in the transcript. That the grand jury did not hear evidence of Perkins uncertainty regarding his photo identification of Marchand is not controlling, since the Government is not obligated to present all its exculpatory evidence to the grand jury. United States v. Addonizio, 313 F. Supp. 486 (D. N.Y. 1970), aff'd., 451 F.2d 49 (3d Cir. 1972), cert. denied, 405 U.S. 936 (1972).

Similarly, in United States v. Pastor, 419 F. Supp. 1318 (S.D.N.Y. 1975), the District Court dismissed a superseding indictment based largely on hearsay. Again, transcripts were introduced from the original grand jury; in addition, one witness testified, but only about new charges. Unlike the case before this Court, there was no live testimony about all the facts of the case; the trial judge held this to be an excessive use of hearsay and

dismissed the superseding indictment. Here, on the other hand, the grand jury heard live first-hand testimony from Victor Roy covering the entire transaction charged in the indictment; indeed the return of the indictment could have rested on his evidence alone.

As another argument mandating dismissal, Marchand contends that because some of Roy's testimony was excluded at the trial it could not form the basis of an indictment. Roy testified before the grand jury approximately three weeks before Agent Handoga. The evidence he related at that time was virtually the same as that repeated by Handoga, in relating his conversation with Roy (A. 171-75). It was also very similar to what Perkins had said, nearly a year earlier. Roy answered questions about meeting his supplier and a female companion in a bar, about the July 18th transaction, and about his selection

of photographs of the supplier and his girlfriend.

First, an indictment, valid on its face, is not rendered invalid because evidence otherwise inadmissible was presented to the grand jury. United States v. Calandra 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956); United States v. Weinstein, 511 F.2d 622 (2d Cir. 1975); United States v. James, 493 F.2d 323 (2d Cir. 1974); United States v. Cole, 463 F.2d 163 (2d Cir.) cert. denied, 409 U.S. 942 (1972). Second, it cannot be said that the grand jury was misled into thinking Roy could identify Marchand when this was not the case. Defendant makes much of the fact that Roy's identification before the grand jury of a photograph of Bob Marchand was unreliable, and for that reason, the grand jury should not have been allowed to base an indictment on such evidence. What defendant fails to note, however, is that while the trial court held the procedure used for eliciting a photo identification by Roy was suggestive, it also held that Roy had an adequate independent basis for being able

to identify the defendant apart from the photographs (A. 301). Thus, to label Roy's testimony unreliable belies the facts; the procedure used was found suggestive, but Roy's ability to identify the defendant was never questioned.* See United States ex rel Curtis v. Warden of Green Haven Prison, 329 F. Supp. 333 (E.D.N.Y. 1971), aff'd., 463 F.2d 84 (2d Cir. 1972).

* Defendant also raises the issue of abuse of the grand jury process regarding Roy. The argument on this point is frivolous; as all of the cases cited are clearly distinguishable. Those cases cited by the defendant involve instances of issuance of grand jury subpoenas to people who were taken before grand juries to testify. Roy was subpoenaed to appear on July 1, 1976; he arrived at the S. Attorney's office in the morning, and testified early that afternoon.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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May 27, 1977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

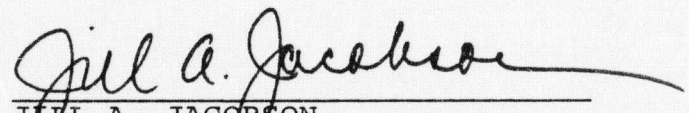
v.

Docket No. 77-1131

ROBERT MARCHAND

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of May, 1977, mailed two copies of the attached Brief to Oteri and Weinberg, counsel for Appellant, postage prepaid, 10 Post Office Square, Boston, Massachusetts.


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